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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

ALLEN JAMES STARKES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND SUPPORTING BRIEF

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QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S NEW TRIAL MOTION WITHOUT AN EVIDENTIARY HEARING?

LIST OF INTERESTED PARTIES

Counsel hereby certifies that the following individuals have an interest in the outcome of this case:

(a) Butler, Honorable Charles R., Jr. -- United States District Judge, Southern District of Alabama

(b) Foster, J. Don, Esq., United States Attorney, Southern District of Alabama

(c) Griffin, Deborah A. -- Assistant United States Attorney, Southern District of Alabama

(d) Madden, Arthur J., III -- Attorney for Appellant

(e) Starkes, Allen James -- Appellant

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS iv

APPENDIX EXHIBIT LIST v

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT vi

OPINIONS BELOW vii

STATEMENT OF JURISDICTION vii

RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS 7

STATEMENT OF THE CASE 1

A. Procedural History 1

B. Statement of the Facts 2

SUMMARY OF THE ARGUMENT 17

REASON FOR GRANTING THE WRIT 18

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF CITATIONS

FEDERAL CASES

Brady v. Maryland,
373 U.S. 83 (1963) 5, 19

Kyles v. Whitley,
_____ U.S. _____, 115 S. Ct. 1555, 63 U.S.L.W. 4303 (1995) 17, 19

United States v. Bagley,
473 U.S. 667 (1985) 19

United States v. Espinosa-Hernandez,
918 F.2d 911 (11th Cir. 1990) 18, 19

United States v. Gates, 10 F.3d 765 (1993) 17

United States v. Reed,
887 F.2d 1398 (11th Cir. 1989) 5, 19

United States v. Spagnoulo,
960 F.2d 990 (11th Cir. 1992) 20

U.S. v. Santiago,
837 F.2d 1545 (llth Cir. 1988) 8

FEDERAL STATUTES

28 U.S.C. § 1254 . . . . . 3, 7

APPENDIX EXHIBIT LIST

Appendix A -- Opinion of the United States Court of Appeals for the Eleventh Circuit dated August 17, 1995 denying rehearing.

Appendix B -- Opinion of the United States Court of Appeals for the Eleventh Circuit dated April 18, 1995 affirming Starkes' convictions and sentence.

Appendix C -- Order of the United States District Court for the Southern District of Alabama dated December 3, 1993 denying Starkes' Motion for a New Trial.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ALLEN JAMES STARKES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Allen James Starkes prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on April 18, 1995.

1. OPINIONS BELOW

On April 18, 1995, the court of appeals for the Eleventh Circuit entered its opinion, *per curiam*, affirming his conviction. A copy of the opinion is attached as Appendix B. A copy of the court's order dated August 17, 1995 denying rehearing is attached as Exhibit A. The district court's order of December 3, 1993 denying Petitioner's motion for a new trial is attached as Appendix C.

2. STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal from a criminal conviction in the United States District Court for the Southern District of Alabama pursuant to 28 U.S.C. § 1254.

3. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISION

Rule 33, Federal Rules of Criminal Procedure:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before

or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

A. Procedural History

Allen James Starkes (hereinafter Starkes or Petitioner) was indicted in the United States District Court for the Southern District of Alabama on January 9, 1991, together with fourteen others. The indictment, as superseded, alleged five counts: conspiracy to distribute crack cocaine; possession of crack cocaine with intent to distribute; aiding and abetting in violation of currency reporting requirements; and two counts of money laundering.

The jury was selected on May 6, 1991, and trial commenced the following day and continued through May 13, 1991. The jury returned a verdict of guilty on Counts One, Three, Four, and Five, but was not able to reach a verdict on Count Two, the substantive cocaine count. (R2-84). On July 19, 1991, following a hearing, the court sentenced Starkes to a term of life without parole on Count One, and concurrent sentences on the other counts of conviction: 60 months on Count Three, 240 months on Count Four and 240 months on Count Five. In addition, the court imposed a fine of $5,000,000.00. (R2-99). Starkes gave timely notice of appeal.

On May 12, 1993, Starkes filed a motion for a new trial. The District Court denied the new trial motion, without hearing, on December 3, 1993. The appeal from the denial of the motion was consolidated with the direct appeal on February 8, 1994. On September 28, 1994, the case was argued to a panel of the Eleventh Circuit Court of Appeals.

On April 18, 1995, the court affirmed, without opinion, Starkes' convictions and sentences and the District Court's denial of the motion for a new trial. Starkes' application for rehearing was denied on August 17, 1995.

B. Statement of the Facts

Jimmy Young testified for the government at Starkes' trial pursuant to a plea bargain agreement and in hope of a Rule 35 sentence reduction. Young testified he met Starkes in November of 1989 at a convenience store. On November 22, 1989, Starkes came to Young's apartment. Using code words for cocaine, Starkes discussed buying 50 kilograms of cocaine, selling it, then buying 150 kilograms of cocaine, and finally buying 200 kilograms from Young. Young could not give Starkes a price, but said he would call his connection in Miami the

next day to get a price. (R16-478-79). Young explained that whatever cocaine price he came up with would involve transfer in Miami, not transportation to Mobile. (R16-465). Starkes said he would take care of transportation. (*Id.*). Young said he made one phone call the following day, but was arrested that afternoon and did not get a price. (R16-466). Young said that in the conversation in his apartment he and Starkes discussed ostrich boots and shoes. (R16-473). Young admitted that he had never supplied quantities of 50 kilograms nor 25 kilograms of cocaine. (R16-474).

On May 12, 1993, Starkes filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. That motion alleged newly discovered evidence of lying by a key government witness, Jimmy Young, the failure of the government to disclose Young's pattern of lying to defense counsel, and Young's recantation of his trial testimony. The facts presented to the district court in the appellant's motion are as follows:

FACTS OF RECORD

1. Jimmy Young lied about Clarence Bush.

On July 17, 1990, Young and the government (through Assistant United States Attorney Charles Kan[illegible]) entered into a plea bargain agreement wherein the government stipulated that the amount of cocaine involved was 1.5 ounces. The agreement required Young to give truthful information and testimony.

John McLain, the Mobile police officer who took Young's statement after his arrest, testified at Clarence Bush's October 31, 1990 hearing that:

> Q: In Jimmy Young's statement to you after he was arrested and given Miranda rights, did he indicate who he was supplying?
>
> A: Yes, sir.
>
> Q: Who did he indicate was selling for him?
>
> A: His relatives Clarence Bush and Jimmy Miller.

(2SR1-114-B, United States v. Bush, hearing 10/31/90, p. 28).

McClain was then asked by Art Powell, Clarence Bush's attorney:

Q: Have you been informed by Mr. Kandt or any other investigating officer that Mr. Young gave another statement as part of his duty to cooperate with the government in another prosecution that in fact he did not supply cocaine to Clarence Bush?

A: My understanding is that he recanted his statement, yes, sir.

(2SR1-114-B, United States v. Bush, hearing 10/31/90, p. 29).

Later at the hearing Powell said to the court:

POWELL: I don't know exactly how to go about doing this. It's been represented to me by Mr. Kandt that Mr. Young gave a subsequent statement in which he said that Mr. Bush didn't have any knowledge of this or any knowledge of any kilo of cocaine.

THE COURT: Let's get that on the record. You interviewed Mr. Young and he denied that Mr. Bush had any involvement.

MR KANDT: Your honor, my recollection is that he stated that -- any reference he made to his supply he meant just -- my recollection he was just referring to Jimmy Miller and he didn't mean to include Clarence Bush in his original statement.

(2SR1-114-B, United States v. Bush, hearing 10/31/90, p. 32).

The government, in a position paper filed with the court on October 10, 1990 in connection with Bush's sentencing, characterized Young's recantation as follows: "Young later refined his original statement to exclude Bush from ownership, management, control of, or benefit for cocaine. Young's statement supported Bush's contention that he was just visiting in Mobile." (Emphasis supplied). (Exhibit D to Starkes' Motion for a New Trial).

Some time between the filing of its position paper and the October 31, 1990 hearing, the government apparently found that Young's "refinement" was a lie. At the hearing, Assistant United States Attorney Kandt said:

> I would like to state that plea agreements which make certain stipulations in both of those cases [Young and Bush], those plea agreements are based upon clarification of earlier statement by Young at a time that when the government was giving Jimmy Young full faith and credit and accepting his statement and his statement as a witness in upcoming cases. On the basis of that entered into the stipulations which probation office has since determined are not factual, are not true reflections of the facts. And also that the -- let the court know that our agreement as far as Jimmy Young's plea agreement is concerned the government feels is breached.

(2SR1-114-B, United States v. Bush, hearing 10/31/90, p. 5).

The court found Bush's explanation of non-involvement with the kilogram of cocaine, corroborated by Young's recantation, to be "untruthful". (2SR1-114-B, United States v. Bush, hearing 10/31/90, p. 44).

2. Jimmy Young lied about Terry Herron.

Jimmy Young testified as a government witness in United States v. Beasley, Criminal Case No., CR-90-00016, on September 27, 1990. Terry Herron was a co-defendant of Beasley. Young testified on direct examination by Assistant United States Attorney E. T. Rolison that he never had any drug dealings with Terry Herron. (Exhibit E to Starkes' Motion for a New Trial, excerpt from United States v. Beasley, pp. 1384-85). Young repeated his assertion that Herron never had any drug dealings with him on cross-examination. (2SR1-114-E, excerpt from United States v. Beasley, pp. 1397, 1406). Herron was acquitted.

After conviction, Beasley filed a motion for new trial. At the December 17, 1990 hearing on the new trial motion, Assistant United States Attorney Rolison said:

> What happened is that this witness [Jimmy Young] testified in [the Beasley] trial, he said he told me not -- not in any kind of written form, he told me that he provided three ounces or four ounces of cocaine to Terry Beasley or Terry Herron. When asked on the stand that -- there's nothing in that statement about it whatsoever about Terry, Terry Beasley. Mr. Deen represented him, Mr. Deen represented Terry Herron. He told me that he provided three ounces of cocaine or four to Terry Herron. When I asked him on the stand, he said that he didn't. And I didn't -- I asked him that question twice.

(2SR1-114-E, United States v. Beasley, p. 1927).

3. Jimmy Young lied in the Starkes trial.

Following Young's testimony in the Starkes trial, Young wrote a series of letters complaining that the government had reneged on its plea bargain with him. In these letters, Young claimed that he had been coerced by the government into giving false testimony in the Livingston, Beasley, and Starkes cases.

On January 13, 1992, the court heard Young's complaint of government coercion and bad faith. E. T. Rolison told the court that the government refused to honor its plea bargain because:

MR ROLISON: I said -- this is the way I remember what I told you. I don't know if I want this on the record or not. But we had a conversation and my position

was, I think I have got to make this known to the court, but I don't have any recommendation about what sentence he should receive. But I want the court to know in a conversation with me he told me that Terry Herron was involved in it and at trial he told me he was not involved in it. And Mr. Houston overheard the conversation after I had the conversation with Mr. Young about that Terry Herron was involved. But at trial, I did not go into it any further but I said I have to make that known to the court and he told me one thing and then he told the court another. That's all I can say.

(2SR1-114-F, United States v. Young, hearing 01/13/92, pp. 8-9).

The court then went on to say:

THE COURT: Well, it's Mr. Young's position that the government wanted him to testify against Herron consistent with what Mr. Young had told Mr. Rolison Mr. Herron's involvement was and when Mr. Young told Houston or whoever that was not true, that the government's insistence that he testify consistent with what he told Mr. Rolison would be putting Mr. Young in the position of not telling the truth?

MR SHIELDS: That is correct.

(2SR1-114-F, United States v. Young, p. 11).

Rolison never told the court or Livingston's counsel that Young had also lied about Bush. However, after the court was informed that Young claimed he gave perjured testimony in the Livingston, Starkes, and Beasley cases, the court said:

> THE COURT: Look sense [sic] I have both Starkes and Livingston on my docket and that is a issue that I believe ought to be resolved on the record on the motion for new trial as to whether or not this defendant gave false testimony in those trials, I don't feel that we ought to go through that three times, once today, once in the Livingston case, and once in the Starkes case.... Is there yet a Starkes motion for new trial that has this letter?
>
> MS GRIFFIN: It is my understanding that it is forthcoming.

(2SR1-114-F, United States v. Young, p. 19).

The court then reset the matter to address "...those issues that are raised by the motion for new trial in the Livingston case and in the anticipated motion for new trial in the Starkes case..." (2SR1-114-F, United States v. Young, p. 22). At the hearing, Young would be available and "...he would be called by the government to refute these

letters that indicate he gave false testimony in Livingston and Starkes and Beasley." *(Id.)*.

The hearing resumed on February 21, 1992, Young was examined by Livingston's attorney, Thomas Boller. Richard Horne, Starkes' trial attorney, appeared and stated that he did not represent Starkes on appeal and that a motion for a new trial based on Young's recantation had not been filed. Horne orally moved for new trial. The oral motion was allowed by the court. (2SR1-114-G, United States v. Livingston, p. 22).

Under questioning by Horne, Young admitted that he wrote Horne a letter dated October 31, 1991, and that:

> Q: And in part this letter says that all testimony that I gave during the course of this trial against your client was coerced by the U.S. attorney's office by your client. You mean Mr. Allen Starkes?
>
> A: Yes.
>
> Q: You further say it was fabricated by the U.S. attorney; is that correct?
>
> A: Yes.

(2SR1-114-G, United States v. Livingston, p. 24).

Young denied that any of this trial testimony was false and said that he had written his recantation letter in anger at the U.S. attorney's office. (2SR1-114-G, United States v. Livingston, pp. 25-26).

Horne's examination of Young was interrupted by Young's rambling, agitated narrative. The court then said:

THE COURT: These proceedings for this witness's purposes are terminated. You will be taken back to Mobile County Jail. We'll bring you back when necessary.

THE WITNESS: Thank you.

THE COURT: Mr. Horne, I am going to interrupt your examination because in my judgment -- reserve my comments for a minute.

THE WITNESS: Thank you, your Honor.

THE COURT: Yes, sir. In my judgment, the witness was becoming agitated to the point that these proceedings were going to deteriorate. But I had not heard anything to that point that would lead me to believe that in any way the finding that I made a few moments ago in regard to Mr. Livingston's case would be altered. I think we were just hearing more of the same in a more exaggerated tone of voice.

(2SR1-114-G, United States v. Livingston, p. 29).

The hearing was never resumed, Horne never completed his examination of Young, and the court never ruled on Starkes' motion for a new trial. The court denied Livingston's new trial motion. (2SR1-114-G, United States v. Livingston p. 30).

On March 26, 1992, Judge Butler ordered Young examined to determine if he was suffering from mental disease. "This finding is based on his abhorrent behavior while testifying in the matter of the motion for new trial in United States v. Livingston on February 21, 1991 in this presence of this Court." (2SR1-114-H). Young was subsequently determined not to have symptoms of major mental disease. (2SR1-114-I).

PROFFERED FACTS

Starkes proffered to the district court by way of affidavits the following facts in support of his motion for new trial which Starkes would expect the evidence to show at an evidentiary hearing:

a. Ronnie Williams. Williams, who represented Noble Beasley at trial, learned prior to trial that Jimmy Young would be a witness against Beasley. Williams requested Brady/Giglio material from the government. After reviewing the information

applied by Assistant United States Attorney E. T. Rolison, the prosecutor in Beasley, he prepared his cross-examination of Jimmy Young.

Young testified in the Beasley case on September 27, 1990 that he had entered into a plea agreement with Assistant United States Attorney Charles Kandt in which, in exchange for his testimony, he would receive a 10 to 16-month sentence. Young also testified in the Beasley trial that he never had any cocaine dealings with Terry Herron. (United States v. Beasley, p. 1384).

Rolison did not tell defense counsel or inform the court that Young had, immediately before his testimony at trial, told Rolison that he had supplied cocaine to Herron. Williams did not learn of Young's changed testimony until well after the trial.

Williams first learned of Young's statements about Clarence Bush on May 5, 1993. Neither E. T. Rolison nor any other assistant United States attorney told Williams of the fact that Young (falsely?) accused Bush of being a confederate then (falsely?) recanted the inculpatory statement. (2SR1-114-J).

b. Thomas Boller. Thomas Boller, the trial attorney in United States v. Livingston, thoroughly reviewed all of the discovery provided to him by the government in preparation for trial. Boller knew that Jimmy Young would be a principal witness against Livingston. Boller did not learn of Young's lie regarding Clarence Bush until May 10, 1993. Neither Assistant United States Attorney Rusty Loftin, the prosecutor in Livingston, nor any other assistant United States attorney told him of Young's lying in the Bush case. (2SR1-114-K).

c. Richard Horne. At trial, Starkes was represented by Richard Horne and Jonathan Shapiro. Horne handled the cross-examination of Jimmy Young.

Prior to trial, Horne requested that the government disclose exculpatory or impeachment information. In preparing for trial, Horne became aware that the government contended Young breached his plea bargain agreement by testifying falsely in the Beasley case regarding the activities of Terry Herron. He was not told by the prosecutor, Assistant United States Attorney Deborah Griffin, or any other assistant United States attorney that Young had given a prior false

statement regarding Clarence Bush. Horne first learned of the prior false statement on May 10, 1993. (2SR1-114-L).

SUMMARY OF THE ARGUMENT

The district court abused its discretion in denying Starkes' motion for a new trial without an evidentiary hearing. First, the unrefuted evidence before the court proved that the government committed a Brady violation in failing to disclose impeachment evidence to the defense. Starkes filed affidavits and record excerpts from related prosecutions which proved that the government knew that the witness Jimmy Young had lied in the prosecution of Terry Herron, that the information was not provided to Starkes' trial attorney, that the information was not available to the defense, and that Young's pattern of lying was material to the outcome of the Starkes prosecution. The government provided no affidavits or documentary evidence to in opposition to Starkes' motion. Starkes was thus entitled to a new trial or, at a minimum, an evidentiary hearing on his motion. Kyles v. Whitley, __ U.S ___, 115 S.Ct. 1555 (1995); United States v. Gates, 10 F.3d 765 (1993); United States v. Espinosa-Hernandez, 918 F.2d 911, 914 (11th Cir. 1990).

REASON FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S NEW TRIAL MOTION WITHOUT AN EVIDENTIARY HEARING.

Starkes based his motion for a new trial on newly discovered evidence of lying by government witness Jimmy Young. Young lied about the involvement of Clarence Bush and Terry Herron in drug dealing activities in two separate drug prosecutions. The government knew that Young had lied about Bush prior to the Starkes' trial, yet did not disclose this information to Starkes' trial attorney. Young also perjured himself at the Starkes trial. In a letter received by Starkes' trial attorney after the trial, Young recanted his trial testimony implicating Starkes.

In support of his motion, Starkes filed excerpts from court proceedings in various prosecutions with which Young was connected as well as affidavits from Starkes' trial attorney and attorneys representing defendants in related cases. The government filed a

response to the motion, but did not file any affidavits or other verified documents in support of its version of the facts.

The trial court denied Starkes' motion without an evidentiary hearing.

In order to obtain a new trial on the basis of newly discovered evidence, a defendant must show that: (1) the evidence was discovered after trial; (2) the defendant used due diligence to discover the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issues before the court; and (5) the evidence is of such a nature that a new trial would probably produce a new result. United States v. Reed, 887 F.2d 1398, 1404 (11th Cir. 1989).

In Kyles v. Whitley, ____ U.S. _____, 115 S.Ct. 1555, 63 U.S.L.W. 4303 (1995) the Supreme Court reaffirmed that a defendant may be entitled to a new trial based on the government's failure to disclose evidence that could have been used to impeach a government witness. United States v. Espinosa-Hernandez, 918 F.2d 911, 914 (11th Cir. 1990), United States v. Bagley, 473 U.S. 667 (1985).

In Brady v. Maryland, 373 U.S. 83, 87 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution." Further, the requirement that the government possess the evidence can be satisfied if the evidence was in the possession of the prosecutor or anyone over whom the prosecutor had authority, including another prosecutor in a different case. United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992).

Starkes submitted documentary evidence of Young's lying and the affidavit of Richard Horne, Starkes' trial attorney, stating that he was not told by the prosecutor or any other Assistant United States Attorney that Jimmy Young had given a prior false statement regarding Clarence Bush. In response, the Assistant United States Attorney asserted in an unsworn reply to Starkes' motion that Young did not lie regarding Bush and, even if he did lie, she did not know anything about it. (2SR1-116). In denying Starkes' motion for new trial, the district court failed to address the issues of whether Young lied

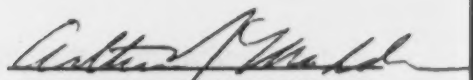
regarding Bush's involvement and, if so, whether the government suppressed or failed to provide that information to Starkes.

Evidence that Young lied in not one but in two drug prosecutions in the Southern District of Alabama would certainly have been impeaching and thus requiring disclosure under Brady. It could not, however, be characterized as "merely cumulative" since the false statements occurred in two different prosecutions. Had Starkes been able to cross-examine Young with specific instances of falsehoods in both the Bush and the Herron prosecutions, there is a reasonable probability that the impact on the jury, and thus the outcome of trial, would have been different. Because Young's pattern of lying was known to the government prior to trial, was not disclosed to the defense and could not have been obtained by the defense, and was material to both guilt and punishment, the court erred in denying the new trial motion without an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this __ day of November, 1995, served a true and correct copy of the foregoing document by first-class mail, postage prepaid, properly addressed on:

Deborah A. Griffin
Assistant United States Attorney
Suite 200
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Mobile, Alabama 36602

and

Drew F. Days
Solicitor General
U.S. Department of Justice
10 & Constitution Avenue N.W.
Room 5141
Washington, DC 20530

ARTHUR J. MADDEN, III

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
August 17, 1995

No. 91-7425 and No. 93-7048 (Consolidated)

D.C. Docket No. 90-145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALLEN JAMES STARKES,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Alabama

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellants Roy Stabler and Allen Starkes are denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge *

*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT
April 18, 1995

No. 91-7425 and No. 93-7048 (Consolidated)

D.C. Docket No. 90-145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALLEN JAMES STARKES,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Alabama

Before KRAVITCH and DUBINA, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

AFFIRMED: See 11th Cir. R. 36-1.

*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA),

vs.)CRIMINAL ACTION NO.90-145

ALLEN JAMES STARKES,)

Defendant.)

ORDER

This matter is before the court on the motion of the defendant for a new trial based on newly discovered evidence. In support of his motion, the defendant has proffered that Jimmy Young, a witness for the prosecution, made statements inconsistent with his trial testimony. Specifically, the defendant claims that Young lied about the involvement of Clarence Bush and Terry Herron in drug dealing activities in connection with other drug prosecutions, and perjured himself in the Starkes trial.

In order to obtain a new trial on the basis of newly discovered evidence, the defendant must show that: (1) the evidence was discovered after trial; (2) the defendant used due diligence to discover

the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issues before the court; and (5) the evidence is of such a nature that a new trial would probably produce a new result. United States v. Reed, 887 F. 2d 1398, 1404 (11th Cir. 1989). "As a matter of law, the trial court cannot grant a motion for a new trial based on newly discovered evidence once it has determined that the movant has failed to satisfy any part of the five-part test." Id. at 1404 (citing United States v. Hall, 854 F. 2d 1269 (11th Cir. 1988)).

The government contends that the defendant could have discovered Young's inconsistent statements about Bush and Herron by looking through public court records. The government further insists that all this additional evidence of Young's statements is merely impeaching, and would not have led to a different result in the Starkes trial.

The crux of the issue is whether the evidence is of such a nature that a new trial would have produced a different result.[1] The

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[1] Insofar as defendant's claim is in the nature of violation of Brady v. Maryland, 373 U.S. 83 (1963), the issue would be similar, i.e.., was the evidence material to the outcome of the trial.

new evidence in this case would have been used to impeach Young by use of prior inconsistent statements. Although some of these statements do not directly bear on the guilt of the defendant, they could have lessened Young's credibility in the eyes of the jury. The court will consider first the defendant's argument with respect to Young's statements regarding Bush and Herron, and then address Young's purported perjury in the defendant's trial.

I. Young's statements concerning Bush and Herron

The defendant argues that the government had a duty to inform his counsel of the fact that Young's statements about Bush and Herron's involvement in drug trafficking were false, and that the government's failure too relay that information creates some uncertainty about the outcome of Starkes' trial, as it casts doubt upon Young's reliability as a witness.

In this case, however, defendant's trial counsel effectively attacked Young's credibility on cross examination, as Young admitted breaking a plea bargain agreement he had had with the government and acknowledged that he was testifying for the government in order to reduce what would have been a lengthy sentence. Defense counsel

stressed Young's demonstrated untrustworthiness and motive to lie in his closing argument. It is difficult to see how more evidence of Young's dishonesty and opportunism would not have been merely cumulative and impeaching.

II. Young's Alleged Perjury At Starkes' Trial

The defendant's only evidence that Young perjured himself at the former's trial is based on a letter Young wrote to Richard Horne, one of the defendant's trial attorneys, in which Young claimed that the government had coerced him into giving false testimony(a claim Young also made in connection with testimony he gave at the Livingston and Beasley trials). At a hearing held February 21, 1992, for a new trial motion filed in the Livingston case, however, Young was questioned by Horne, and explicitly retracted his charges against the government, as the following passages from the transcript make clear.

> Q (by Mr. Horne): Was any of your testimony at Starkes') trial false?
>
> A (Young): No, none of my testimony was false at trial.
>
> Livingston New Trial Transcript, p.24.
>
> Q: Was any of your testimony at trial fabricated?

A: No. The reason for the coercing and the fabrication was plainly this. I felt, the Unites States, by their attorneys, through their attorneys, that I was betrayed by one Judas and one Jezebel. That's the only thing that I thought. And I wanted to get back at Ms. Griffin (the Assistant United States Attorney who handled Young's case). I though she was a Jezebel. She betrayed me and I wanted to get back at her.

Livingston New Trial Transcript, p. 25-26.

With this testimony, Young provided an eminently plausible rationale for his letter to Horne accusing the government of suborning perjury, and fully retracted that accusation. "(R)ecantations are viewed with extreme suspicion by the courts", U.S. v. Santiago, 837 F.2d 1545, 1550 (llth Cir. 1988), and this skepticism is all the more justified when the recantation is itself withdrawn. Indeed, if anything, Young's wild charges, and their occasionally histrionic retraction at the Livingston hearing, only add more weight to the defendant's ably developed trial attack on Young's credibility.

Finally, even if the defense had had all of the above evidence at trial, the result would not likely have been different, as Reed requires. At this arrest, the defendant possessed 126 grams of 90%

pure cocaine, as well as a briefcase containing $150,000 in cash, and many witnesses besides Young testified in great detail about the defendant's drug trafficking and money laundering activities.

Because the defendant has failed to proffer new evidence that might create a different result at a new trial, the motion for a new trial is DENIED.

It is so **ORDERED.**

Done this the __ day of December, 1993.

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UNITED STATES DISTRICT JUDGE